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Sentence

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 UNITED STATES OF AMERICA,

New York, N.Y.

4 v.

12 CR 934 (RA)

5 SHU FENG XIA,

6 Defendant.

7 -----x

8 August 8, 2014  
9 11:00 a.m.

10 Before:

11 HON. RONNIE ABRAMS,

12 District Judge

13  
14 APPEARANCES

15 PREET BHARARA

16 United States Attorney for the  
17 Southern District of New York

BY: REBECCA MERMELSTEIN

17 Assistant United States Attorney

18 JOSHUA DRATEL

19 Attorney for Defendant

20 Also Present: Victor Chang, Mandarin Interpreter

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1 THE DEPUTY CLERK: All rise.

2 (Case called)

3 MS. MERMELSTEIN: Good morning, your Honor, Rebecca  
4 Mermelstein for the government. With me is intern in our  
5 office, Alexander Beer.

6 THE COURT: Good morning.

7 MR. DRATEL: Good morning, your Honor, Josh Dratel for  
8 Mr. Xia, who is seated next to me.

9 THE COURT: Good morning, Mr. Dratel, and good morning  
10 to you, Mr. Xia.

11 This matter is on for sentencing in United States  
12 versus Shu Feng Xia.

13 In connection with today's proceeding I have reviewed  
14 the revised presentence investigation report dated July 29th,  
15 2014, including the recommendation and addendum, the  
16 defendant's sentencing memorandum dated July 25th, 2014, which  
17 includes letters from the defendant and his wife, daughters and  
18 other family members, as well as his employer, and a letter  
19 from the government dated August 3rd, 2014.

20 I also have the Government's June 27th and August 7th  
21 letters regarding forfeiture.

22 Have the parties received each of these submissions  
23 and have they been filed with the Clerk of Court?

24 MS. MERMELSTEIN: Yes, your Honor.

25 MR. DRATEL: Yes, your Honor.

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1 THE COURT: Thank you.

2 And is there anything else, is there anything that I'm  
3 missing?

4 MS. MERMELSTEIN: Not from the government.

5 MR. DRATEL: No, your Honor.

6 THE COURT: Mr. Dratel, have you read the presentence  
7 report and discussed it with your client?

8 MR. DRATEL: Yes, I have, your Honor.

9 THE COURT: And has it been translated for him.

10 MR. DRATEL: Yes, it has.

11 THE COURT: Mr. Xia, have you read the presentence  
12 report -- just actually hold on a second, please. I'm sorry,  
13 you know what, I should swear in the interpreter, so I'd like  
14 to do that now.

15 (Interpreter sworn)

16 THE COURT: Thank you.

17 So, Mr. Xia, have you read the presentence report and  
18 has it been translated for you?

19 THE DEFENDANT: Yes.

20 THE COURT: And have you had enough time and  
21 opportunity to discuss it with your attorney?

22 THE DEFENDANT: Yes, I had it.

23 THE COURT: Okay.

24 Mr. Dratel, I understand you have a few objections to  
25 the report, so why you don't we go through them. You can sit

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1 down, Mr. Xia.

2 So first I understand that you object to paragraph two  
3 which delineates the time period of the conspiracy as alleged  
4 in the indictment. In your view, does this inaccurately  
5 summarize the allegations in the indictment?

6 MR. DRATEL: No. That's more of an objection just in  
7 terms of not taking -- not portraying, misleading portrayal of  
8 Mr. Xia's length of participation, but in a sense of just  
9 describing the indictment, it's accurate.

10 THE COURT: I think that's all it does.

11 MR. DRATEL: Yes.

12 THE COURT: The section is entitled "charges and  
13 convictions." If there was a different place where you wanted  
14 me to add in the dates of his employment, I would consider  
15 doing that, although I know there is a separate dispute about  
16 that. But I'm going to keep this as is, so I'm going to  
17 overrule that objection.

18 Second, and I think this goes to where he worked and  
19 when. You object to the characterization in page 53.

20 MR. DRATEL: Paragraph 53.

21 THE COURT: Paragraph 53 -- I'm sorry, paragraph 53;  
22 that Mr. Xia worked both at the Moslemi and the Bandrich firms,  
23 claiming that he only worked at the Bandrich firm. I'll hear  
24 the government. I'll say I'm inclined to agree with you about  
25 this, as well Victor You testified that Mr. Xia was trained as

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1 a coach in the Moslemi firm. I don't think it's clear anywhere  
2 from the record that he actually worked as a coach or worked in  
3 any other capacity at the Bandrich firm. I looked at the  
4 transcript pages, in particular at 606 and 607 and 717.

5 But, Mr. Mermelstein, if you want to speak to this  
6 issue, I'm happy to do that.

7 MS. MERMELSTEIN: Your Honor, the Government's not  
8 contending that he sort of worked there on a daily basis at any  
9 particular time. I think that in being trained there, there is  
10 an implication that he met with clients there. But I think  
11 it's also significant that when he was arrested on the day that  
12 the arrest were executed in this case more broadly, he was  
13 arrested at the Feng Ling Lui Moslemi law firm, not at the  
14 Bandrich law firm, so.

15 THE COURT: Well, he has family members there. He  
16 clearly was connected to it. I think the question is did he  
17 work there. And I'm happy to tweak the language to ensure its  
18 accuracy. So, for example, we could say he was trained as a  
19 paralegal at the Feng Ling Liu Moslemi law firm, and  
20 subsequently worked at the Bandrich firm.

21 MS. MERMELSTEIN: That's fine.

22 THE COURT: Mr. Dratel, is that acceptable?

23 MR. DRATEL: Sure.

24 THE COURT: So I'm just looking at the transcript to  
25 see how I --I'm going to say, subsequently worked in that

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1 capacity. Because there is a reference to a paralegal at the  
2 Bandrich law firm. Okay, so that's number two.

3 And then you object to the nine level enhancement.

4 MR. DRATEL: Yes.

5 THE COURT: Because the offense, as calculated in the  
6 presentence report, holds him responsible for 100 or more  
7 fraudulent documents.

8 How many documents do you think he should be held  
9 responsible for? I mean, as you know, there are three  
10 categories here. There is nine level enhancement for 100 or  
11 more, six level enhancement for 25 to 99 and three level for six  
12 to 24.

13 MR. DRATEL: Three levels, your Honor. Probably  
14 somewhere between one and two dozen.

15 THE COURT: He worked at the law firm -- I think it's  
16 undisputed that he worked from July 2011 to 2012.

17 I'm happy to hear you. I obviously read your letter,  
18 but if there is anything else you would like to say on this  
19 point, I'm happy to hear you out.

20 MR. DRATEL: Just that the burden's on the government.  
21 They don't have evidence of a number that would put it in  
22 there, other than this just omnibus blanket accountability for  
23 the entire firm, which the Second Circuit law clearly doesn't  
24 permit. It has to be some specific connection to Mr. Xia. He  
25 only handled a limited number of clients. That would

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1 correspond to the three point enhancement. And so that's -- I  
2 mean, that's what we're bound by, in the sense that there is no  
3 evidence otherwise.

4 And the inferential -- the leaps of inference that the  
5 Government wants to the Court to make, such that he had a  
6 pamphlet on his desk somehow means that he used it all the time  
7 and somehow that expands the number just doesn't make any  
8 sense. He could used it once and used the pamphlet. It  
9 doesn't mean anything it's on his desk. I have things on my  
10 desk that I consult once a year so, you know.

11 THE COURT: There was a lot of evidence at trial that  
12 this was a fraud mill.

13 MR. DRATEL: But there was no evidence as to what his  
14 that, what his volume was -- Victor -- and, you know, I wasn't  
15 there. I didn't get a chance to cross-examine. I don't really  
16 feel bound by, even by the very very small snippet of testimony  
17 that concerns Mr. Xia, which is very little. And I didn't get  
18 a chance to cross-examine Mr. You about the nature of his  
19 recollection. But even still he didn't put him in that  
20 position, just to say someone's a paralegal, someone's  
21 involved. They don't have a roster of people whose  
22 applications were processed or coached by Mr. Xia. That's what  
23 they need. So I can't prove a negative. They have to prove,  
24 according to the Second Circuit cases, Walker, they have to  
25 prove it and it's just, it can't flow in the air as some sort

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1 of mass accountability. That's just not the way cases work  
2 according to the case law. So in that context, I don't know  
3 what I can prove, other than to put the government to its proof  
4 in that regard.

5 THE COURT: All right, Mr. Mermelstein.

6 MS. MERMELSTEIN: Thank you, your Honor. I think  
7 we've laid out our point in our letter. But succinctly I just  
8 don't see how this is a close call. No one is trying to hold  
9 him accountable for the 2,000 applications involved in the  
10 conspiracy. We're talking about the nearly 300 applications  
11 filed by the Bandrich law firm during the specific time that he  
12 worked there. There was trial testimony that I think  
13 circumstantially certainly established that the defendant was  
14 the only coach working at the law firm, and that as a matter of  
15 the business practices of the firm all clients of the firm  
16 would have met with the coach during the process of their  
17 pending asylum application.

18 THE COURT: What about Rachel Yang and Harry Liu?

19 MS. MERMELSTEIN: I think that they had different  
20 roles in the firm. This defendant was not a story writer.  
21 This defendant did not craft the stories that were then going  
22 to be submitted to the law firm. That was a job that was  
23 really done by Rachel Yang in connection with Harry Liu. Harry  
24 Liu served as the office manager. He had a supervisory role  
25 over the entire office. He met with people to ascertain if



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1 they were going to sort of fit -- their stories could be fit  
2 into the fraud.

3 But I think that, you know, at sentencing your Honor  
4 is entitled to rely on every kind of evidence, including  
5 circumstantial evidence. And here where there is evidence that  
6 the defendant would have met with, essentially, all of the law  
7 firms applicants, and the government has established how many  
8 applications were filed during the timeframe that the defendant  
9 worked there, and it's not like the number is 100 and so if  
10 there are just a couple that he didn't meet with on his own  
11 it's three times as many as the cut off would be. And so I  
12 don't see there can be any kind of argument that the government  
13 hasn't shown that it's at least 100.

14 The idea that 18 months of working there in which his  
15 essential sole job was to prep people for these asylum  
16 interviews, he would have met --

17 THE COURT: Where in the trial transcript does it say  
18 it was his sole job, and that he was the only coach who did  
19 this? I mean, it's true there's not a lot of testimony about  
20 him in the trial transcript. We went through it.

21 MS. MERMELSTEIN: I think that there is nowhere in the  
22 trial testimony that says that was his sole job. Of course the  
23 trial, because it wasn't about this defendant, there is  
24 testimony that could have been offered that wasn't because it  
25 wasn't relevant.

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1 THE COURT: Understandably.

2 So I'm speaking now just from the trial testimony, but  
3 also from sort of knowledge about the facts of the case,  
4 generally.

5 Based on the Government's evidence, the witnesses who  
6 the asylum applicants went into the law firm, the cooperating  
7 witnesses who talked about what was going on at the law firm,  
8 it is the Government's understanding that this defendant did  
9 not do anything but coach; that he didn't write stories. His  
10 name has not been found on any of the paperwork that we would  
11 have expected it to be found on if he was doing, for example,  
12 story writing. So I think that there is a fair inference that  
13 was his only role. Of course if he had other roles, then he  
14 was meeting with other clients in other capacities.

15 The idea that in 18 months he met only with a dozen  
16 clients just doesn't make any sense. And so I think given the  
17 proof about the number of applications, the way that the fraud  
18 generally worked, who worked in that law firm, and the  
19 defendant's role, I think it's a very fair inference that he  
20 was involved in more than 100 applications.

21 THE COURT: Okay thank you.

22 MR. DRATEL: Your Honor, it's not a Res ipsa loquitur  
23 theory of liability. I don't think the government can proceed  
24 that way, whereas somehow there is a some default position that  
25 unless you prove no, yes is the answer. They have to prove yes

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1 and they just haven't, and that's their burden. They can't  
2 just go on this notion that it couldn't have happened another  
3 way or somehow it had to happen this way because of series of  
4 inferences that aren't necessarily factual, but merely  
5 hypothetical. You would think there would be proof if they  
6 have so much -- there would be proof. There is no proof.

7 THE COURT: All right.

8 In my view I don't have enough evidence before me to  
9 impose the nine level enhancement at this time, but I do think  
10 that evidence warrants a six level enhancement. And I should  
11 say that if the government wants a Fatico hearing on this, I'm  
12 happy to give you the opportunity to have one. But based on  
13 the record before me I'm assuming you don't want that. So  
14 speak up if you do.

15 It's undisputed that Mr. Xia worked at the Bandrich  
16 firm from July 2011 to December 2012, one and a half years.

17 Mr. Xia argues that he only began paralegal duties  
18 there later in 2011. However, Victor You testified at trial  
19 that he trained Mr. Xia as a coach before the Bandrich firm was  
20 opened, which suggests Mr. Xia began his criminal activity upon  
21 arrival. Trial transcript 607.

22 We know from the trial testimony that Mr. Xia coached  
23 at least Huai Guo Wu and Jason Xue to lie to the immigration  
24 authorities. At Mr. Xia's plea hearing he stated that he  
25 coached some clients of the firm, whether it was based on falun

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1 gong or based on the religion which suggests it was more than  
2 just a few.

3 In addition, the government represents that during one  
4 and a half years that Mr. Xia worked at the Bandrich firm, the  
5 firm filed approximately 265 applications. There was  
6 overwhelming evidence at trial that these firms were fraud  
7 mills. Victor You and Meng Fe Yu testified that virtually all  
8 of the Moslemi firm applications were fraudulent. Trial  
9 transcript 510 to 511. 1206-1207. At the Bandrich firm, Jason  
10 Shu interacted with Mr. Xia, Rachel Yang and Harry Liu, all of  
11 whom demonstrated through their speech and conduct that they  
12 engaged in asylum fraud on a regular basis. I'm looking at  
13 government exhibits 112T, 128T, 141T.

14 As a result, there is more than sufficient evidence  
15 for me to find by preponderance of the evidence that Mr. Xia is  
16 involved in at least 25 applications, subjecting him to the six  
17 level enhancement. It may well be that he was also involved in  
18 more than 100 applications. The problem there is, as I  
19 mentioned a minute ago, is that he wasn't mentioned extensively  
20 at trial and there simply isn't a great deal of evidence about  
21 him in the record. And as I said, if you want a Fatico hearing  
22 you can have one, but I'll explain my thinking on the nine  
23 level enhancement.

24 As I stated a moment ago, the evidence does support  
25 the claim that Mr. Xia worked at both firms, so we're going to

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1 focus on -- does not support that he worked at both firms so  
2 we're going to just focus on Bandrich.

3 The government claims that other than the few  
4 occasions on which Victor You went to the Bandrich firm to  
5 assist him, Mr. Xia handled the coaching alone. Looking at  
6 Victor You's testimony, I don't think it says quite that much.  
7 Indeed, it appears that Rachel Yang may have done some coaching  
8 herself. I'm looking at government exhibit 112T, 17 to 19, and  
9 34, and she was at the firm for more than a year as I  
10 understand it.

11 Other than Huai Guo Wu and Jason Xue, there's just a  
12 lack of evidence linking Mr. Xia to over 100 specific  
13 applications, you know, let alone fewer than that as a result,  
14 although he may well be responsible for all of the  
15 applications, all of the 265 of the Bandrich firm, there's  
16 insufficient evidence on the record for me to say this case is  
17 distinguishable from United States versus Walker. In that case  
18 the Second Circuit reversed the imposition of the enhancement  
19 of the translator in an immigration law firm where there was a  
20 derth of evidence connecting him to individual applications,  
21 and it was likely that certain applications were attributable  
22 to another employee. 191 F.3d at 339.

23 As I mentioned earlier, there were other people who  
24 worked at the Bandrich firm, including Rachel Yang and Harry  
25 Liu, although the extent to which they coached clients is

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1      unclear from the record.

2                    Given though that Mr. You -- Mr. Xia worked at the  
3      firm for a year and a half, the firm was fraud mill, and Mr.  
4      Xia indisputably played an important role at the firm as a  
5      coach, I think it would be unreasonable to believe that he  
6      worked with fewer than 25 clients.

7                    In applying the six level enhancement, I'm not holding  
8      him responsible for applications produced by his  
9      coconspirators. The record does not reflect, for example, the  
10     extent to which he collaborated with other employees of the  
11     firm or assisted them with their work. As a result, the scope  
12     of the criminal activity that Mr. Xia you agreed to jointly  
13     undertake is unclear.

14                   I note that although Mr. Xia raised this issue in his  
15     submission, and the government has argued the point in its  
16     supplement sentencing letter concerning Lillian Miao, the  
17     government has not argued here that he should be held  
18     responsible for the acts of his coconspirators.

19                   So that's my ruling on the enhancement.

20                   Next, Mr. Dratel.

21                   MR. DRATEL: I think the other --

22                   THE COURT: Yes.

23                   MR. DRATEL: I think the other paragraphs to which  
24     there were suggested changes have all been incorporated,  
25     they're mostly factual.

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1 THE COURT: I think that's right. It was just about  
2 the third point, right?

3 MR. DRATEL: Right.

4 THE COURT: Let's talk about the third point.

5 So, the government opposes the reduction of the third  
6 point, which I believe deprives Mr. Xia of his ability to  
7 receive -- a government motion is necessary -- isn't a  
8 necessary prerequisite to the granting of the third point. And  
9 you know the law I'm citing, United States versus Lee. Unless,  
10 one, the government's refusal to move is based on an  
11 unconstitutional motive or, two, a plea agreement leaves the  
12 decision to move to the Government's discretion and the  
13 government acts in bad faith. There's no reason to believe the  
14 government's acting in bad faith here. They stated clearly on  
15 the record back I believe in January, is that right, that for  
16 anyone who didn't plead guilty by February 14th, they were  
17 going to fight the third point. They were not going to make a  
18 motion. And I think it's in their right not to make a motion  
19 so I don't know what the basis would be for me to give him a  
20 third point.

21 MR. DRATEL: It's more of a 3553(a) issue, your Honor.

22 THE COURT: Okay. I'm aware of the fact that he pled  
23 guilty, he's getting a two point reduction for it, but that's  
24 where we are.

25 So other than that, I know some of the other comments

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1 that you wrote in your letter have been addressed in the final  
2 version of the presentence report. Is there any other  
3 objections?

4 MR. DRATEL: No, your Honor.

5 THE COURT: Okay. Does the government have any  
6 objections?

7 MS. MERMELSTEIN: No, your Honor.

8 THE COURT: The Court adopts the factual findings in  
9 the report as modified today. The presentence report will be  
10 made a part of the record in this matter and placed under seal.  
11 If an appeal is taken, counsel on appeal may have access to the  
12 sealed report without further application to the Court.

13 Mr. Xia, as I advised you at your plea hearing,  
14 although courts are no longer required to follow the United  
15 States Sentencing Guidelines, we're still required to consider  
16 the applicable guidelines in imposing sentence. And to do so  
17 it's necessary that we accurately calculate the sentencing  
18 range, so that's what I'm going to do now.

19 So for the reasons stated above, in light of my  
20 conclusion that the offense involved at least 25 to 99  
21 documents, and Mr. Xia is entitled only to two acceptance  
22 points and not three, I find that the offense level is 15,  
23 defendant's criminal history category is one, and the  
24 guidelines range is 18 to 24 months in prison with an  
25 applicable fine of \$4,000 to \$40,000. Do you all agree with



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1 that?

2 MR. DRATEL: Yes, your Honor.

3 MS. MERMELSTEIN: Yes, your Honor.

4 THE COURT: And just to confirm, neither party is  
5 seeking a departure as opposed to a variance from this  
6 guideline range, is that correct?

7 MS. MERMELSTEIN: That's correct.

8 MR. DRATEL: Correct, your Honor.

9 THE COURT: All right.

10 In any event, I have considered whether there is an  
11 appropriate basis for departure from the advisory range within  
12 the guidelines system. And while recognizing that I have the  
13 authority to depart, I do not find any grounds warranting  
14 departure under the guidelines.

15 Now I'll hear from the parties. Would the government  
16 like to be heard? I read your letter, but I'm happy to hear  
17 anything else you like to say.

18 MS. MERMELSTEIN: Your Honor, I don't think I have  
19 anything different to say than what's in our letter. I think  
20 there are really two points that need to be emphasized about  
21 this defendant's sentence.

22 The first is that there are cases in which general  
23 deterrence is not a realistic goal I think. And there are  
24 cases where it is. And I think this is a case where general  
25 deterrence serves an incredibly important function. This is a

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1 case that the government has been living with now for a number  
2 of years, and that is going to continue at least civilly for  
3 many many many more years. Because the result of this  
4 indictment and of the related indictments is that there is  
5 something like 10,000 asylum applications that are essentially  
6 presumptively fraudulent; that is, they were filed by law firms  
7 that we have evidence didn't do anything but fraud, but there  
8 needs to be an individual determination on each asylum  
9 applicant as to what's going to happen. It is a massive  
10 undertaking that's going to go on for years.

11 This was an open secret in Chinatown. This is a fraud  
12 that was brazen and not very carefully sort of covered up, and  
13 was known by all of the participants and was known by the  
14 applicants. And this case and the related cases has a lot of  
15 attention in the Chinese press and what is happening at these  
16 sentencings is being closely followed. And I think that here a  
17 sentence below the guidelines, a sentence that's not a  
18 significant sentence sends a message to the law firms that are  
19 still operating, that are still doing the same fraud, that it's  
20 not that big of a deal, and it becomes a reasonable cost of  
21 doing business to risk a short jail term in return for the  
22 financial gains of this.

23 And so a significant sentence is necessary not just  
24 for this particular defendant, but to deter this conduct and to  
25 deter people from taking these jobs and continuing to engage in

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1 this kind of fraud.

2 I think that that sentencing is appropriate for this  
3 defendant as well. And I think it's really -- the defendant  
4 has argued in large part that he should be given some kind of  
5 credit because he had this motivation to help people because of  
6 his own difficult experiences in China. And we don't know if  
7 his representations about what happened to his family in China  
8 are true. We don't have access to records from China. It's  
9 odd to the government that in a case about people falsifying  
10 records and getting letters of support to make claims about  
11 these kind of experiences, all of the defendants in the case  
12 seem to be claiming that they themselves are in that situation.  
13 But, frankly, it's more troubling if he didn't -- if he did  
14 have that kind of experience in China, and then used that  
15 experience to perpetrate this fraud against the government;  
16 that having come to the United States through that very  
17 process, he then turned it around for financial gain. And the  
18 idea that he was motivated by sympathy for people who are in  
19 the same situation as him is preposterous. Because had the  
20 applicants, had the clients of this law firm been in the same  
21 situation as the defendant, they wouldn't have needed to commit  
22 a fraud if they had actually suffered persecution based on the  
23 there participating in Falun Gong or forced abortion. And no  
24 ones is disputing that those things are happening in China and  
25 that's why we need asylum. Then those people would have been

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1 eligible for it. This was a money maker. They charged  
2 immigrants -- your Honor heard the testimony at trial --  
3 generally speaking, people of very limited means, thousands and  
4 thousands of dollars to file these fraudulent applications.  
5 And if the defendants were trading on their own personal  
6 experiences to do that, it's almost worse than if they're just  
7 making the whole thing up. And so I think for that reason a  
8 specific, a guideline sentence is also needed to punish this  
9 particular defendant. And so for those two reasons the  
10 government submits that a guidelines sentence is appropriate in  
11 this case.

12 THE COURT: Thank you.

13 Mr. Dratel.

14 MR. DRATEL: Thank you, your Honor. And I know the  
15 Court has read the submissions, so I'm not going to go through  
16 in detail. Just to concentrate on a couple of things.

17 One is remorse, which I think is clear and expressed  
18 very articulately in Mr. Xia's letter, very clearly in the  
19 letters also from his family, many of whom are here, his two  
20 daughters, his wife.

21 THE COURT: I want to thank you will for being here  
22 and let you know I have read every one of the letters that you  
23 submitted.

24 MR. DRATEL: Right. So, you know what's in there and  
25 I'm not going to go through it.

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1 I think the Government's argument about veracity of  
2 his, of his own experience is -- I'm really not sure where it  
3 comes from. Because the notion that his wife would leave her  
4 two kids and her family for four or five years come to the  
5 United States as part of some fraud is really preposterous, and  
6 it's really an affront to them and to her. So that's all I can  
7 say about it. I mean, it's one thing to have proof. It's  
8 another thing to make a naked allegation that is really off the  
9 charts in that regard.

10 He didn't make a lot of money on this. He probably  
11 made what he would have made had the entire operation been  
12 legal legitimate. He certainly didn't make any profit from it  
13 in that regard.

14 On the issue of motivation, a little of a straw man in  
15 the sense that the motivation part is about this, is that a lot  
16 of people do things out of greed, a lot of people do things out  
17 of love, lot of people do things for reasons that aren't  
18 designed in some way to have a part of it that is motivated to  
19 do something positive.

20 It is unimaginable to us, it is inconceivable to us  
21 what life is like in certain countries, and in rural China and  
22 other parts of China. That's one of the things.

23 How many of us, in the prime of our lives, desperately  
24 want to pick up, leave everything here and start over in a  
25 completely strange environment where you don't speak the

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1 language, you don't have any skills? How many of us are going  
2 to do that? Why? Why would we do that? Why would so many  
3 people do that? That's why he wanted to help people. That is  
4 what he went through. That is why motivation is important in  
5 the context of punishment -- not in the context of what's legal  
6 or illegal. And if you put it in that perspective, it makes a  
7 lot more sense than the way the government portrays it.

8 THE COURT: I think the Government's point is, as you  
9 know, is that if the motivation was really to help people who  
10 are being persecuted, as opposed to people who wanted to get  
11 away from poverty or some other legitimate reasons, he ended up  
12 hurting those people, the legitimate asylum seekers through  
13 this conduct, like I think everyone at that firm did. Because  
14 I think if you engage in this kind of fraud to the government,  
15 it only ultimately ends up hurting legitimate asylum seekers.  
16 That's what I understood the government's argument to be. I  
17 don't mean to mischaracterize it, but in any event.

18 MR. DRATEL: I don't think Mr. Xia would disagree with  
19 that at this point. Obviously taking a longer view of it than  
20 the just immediate issue of someone who wants to say in the  
21 United States and knowing what, in that personal context,  
22 knowing what it would mean for that person who is sitting  
23 across from you has to go back.

24 General deterrence. I have to deal with it my whole  
25 career in this context. Just, there is no proof. I mean,

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1 there is no empirical evidence about general deterrence, just  
2 as an abstract issue in terms of -- you know, we've never seen  
3 any -- studies show the opposite, that general deterrence is  
4 not necessarily a factor in sentencing or about certainty of  
5 punishment, rather than length and severity of punishment.  
6 That's historical going back a millennium.

7 THE COURT: You don't think in terms of deterrent  
8 value there is any difference between incarceratory sentence or  
9 non-incarceratory sentence and the length of it?

10 MR. DRATEL: Only in very limited contexts, and not  
11 for this defendant. That's what I want to get to very  
12 specific.

13 First argument is abstract which is really there is no  
14 empirical evidence that general deterrence affects the unknown  
15 proto defendant -- putative defendant out there somewhere who  
16 don't even know what he's, what he's motivated by, what his own  
17 compelling factors are that lead to crime.

18 But in the context of specifically in this case,  
19 general deterrence, there has been dozens of other defendants  
20 who have been sentenced and will be sentenced in the course of  
21 this investigation and like investigations. He should not be  
22 the one who is saddled with general deterrence or where  
23 everybody else gets a sentence that they deserves, but he gets  
24 a sentence that somebody else deserves, who hasn't even  
25 committed a crime yet. I don't think his sentence is a message

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Sentence

1 to anyone.

2           There have been so many sentences in these cases.  
3 There are lawyers who get time and there are lawyers who walk.  
4 He's not -- a paralegal, he's the low -- the notion that the  
5 ninth guy in a nine person indictment out of 30 or 40 or 50  
6 defendants in the course of these multiple indictments were  
7 going to be sentenced, that he's at the bottom of that level,  
8 the notion that his sentence is going to motivate or is going  
9 to be a factor in someone's behavior down the road, I think  
10 just defies logic, practicality, experience, all of those  
11 things. And it defies justice in the context of why should he  
12 be the one who has to have a general deterrence sentence,  
13 whenever everybody else gets another type of sentence. People,  
14 like I say, lawyers -- you know, I mean I've sat through -- I  
15 just by chance I happen to sit through one of the sentences in  
16 a companion indictment in front of Judge Marrero for a lawyer  
17 who -- he's not in that category, and his sentence will not be  
18 a message to anyone. The principals who were going to be  
19 punished in a way that the Court sees fit and have been in  
20 other cases, could be a different situation. But for him it's  
21 not a factor. And the general deterrence to me, it is not a --  
22 from just experience in not only in this case, but experience  
23 in other cases, for this defendant the difference between an  
24 incarceratory sentence or non-incarceratory sentence will make  
25 no difference for the public at large. It will not have an



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Sentence

1 impact. The only impact it will have will be on him and his  
2 family, the human impact toll it will take on him and his  
3 family, in addition to the collateral consequences that he and  
4 his family will endure and have endured and will continue to  
5 endure now and forever because they're going to be in the  
6 position where there are going to be prohibitions on seeing  
7 each other, just practical nature of going back to China or  
8 coming here. It's just not going to be, it's just not going to  
9 be possible.

10 So I really think that there isn't a value, other than  
11 in a sort of technical application of either the guidelines or  
12 other factors, there is no value of a prison sentence here. It  
13 doesn't accomplish anything tangible, positive or just I think  
14 in the context of what we're trying to do in the system in a  
15 system where we're recognizing that sentences that include  
16 incarceration should have some value beyond just mechanistic  
17 application of numbers to persons.

18 THE COURT: Thank you.

19 Mr. Xia, I read your letter, but I'm happy to hear  
20 anything you like to say today.

21 MR. DRATEL: I think he'd prefer to rest on his  
22 letter, your Honor.

23 THE COURT: Is there any reason why sentence should  
24 not be imposed at this time?

25 MS. MERMELSTEIN: No, your Honor.

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Sentence

1 MR. DRATEL: No, your Honor.

2 THE COURT: As I stated, the guidelines range  
3 applicable to this case is 18 to 24 months in prison.

4 Under the Supreme Court's decision in Booker and its  
5 progeny, the guidelines range is only one factor that I must  
6 consider in deciding the appropriate sentence.

7 I'm also required to consider the other factors set  
8 forth in 18 United States Code 35, Section 3553(a) and I've  
9 done so.

10 Mr. Xia stands convicted of one count of conspiracy to  
11 commit immigration fraud. During his time working as a  
12 paralegal at the Bandrich firm, he played an important role in  
13 a scheme to defraud immigration officials and courts into  
14 granting asylum to ineligible applicants by coaching them to  
15 lie. He did this, he acknowledged at his plea, by advising  
16 them how to tell government officials that they belonged to  
17 Falun Gong or were persecuted for being a church member, when  
18 that wasn't true.

19 This is a serious crime. Although as he is described,  
20 his role is limited, and it is true that he did not supervise  
21 others, and notes that he did not profit specifically from the  
22 fraudulent scheme, his role was nonetheless important. And as  
23 most, if not all of the applications filed in the Bandrich firm  
24 were fraudulent, he did indeed profit from the fraudulent  
25 scheme.

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1           This kind of exploitation of our immigration system  
2 endangers the public, compromises the integrity of the  
3 immigration system, and harms legitimate asylum seekers as we  
4 discussed a moment ago.

5           It also squanders taxpayer resources because DHS and  
6 other law enforcement agencies devote significant time and  
7 resources to investigating and attempting to prevent this type  
8 of immigration fraud.

9           In terms of the factors set forth in 18 U.S.C. 3553(a)  
10 it's particularly important in a case like this not only to  
11 have the sentence promote respect for the law and provide just  
12 punishment for the offense, but to afford adequate deterrence  
13 to others who may seek to engage in this conduct.

14           And as to your argument, Mr. Dratel, I'm looking at  
15 all of the 3553(a) factors. Deterrence is one of them, and I'm  
16 looking at all of them.

17           I have also considered Mr. Xia's personal and family  
18 history. At the age of 47 this is his first arrest and  
19 conviction. I've also read about the difficulties in his  
20 childhood and how he was raised in extreme poverty in a home  
21 that lacked basic necessities and how now he supports numerous  
22 family members financially and otherwise.

23           I'll tell you, as I said a minute ago, I read each of  
24 the letters from family members. I don't have control over  
25 deportation, which I think some of you may believe, but in any

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Sentence

1 event I read all of them. It's clear to me from them that you  
2 are a very important part of all of your family members lives,  
3 that you are loved, and many of them described you as hard  
4 working, filial, devoted, selfless.

5 So I considered the good and the bad, the good aspects  
6 of your life and you as a person, and the bad in terms of the  
7 crime that was committed here that I view as a very serious  
8 crime here in our country, to help people lie to our country  
9 day in and day out. So I have considered all of that and am  
10 ready to impose sentence.

11 It is the judgment of this Court that you be sentenced  
12 to a term of one year and one day in prison, to be followed by  
13 three years of supervised release. I'm not imposing a fine  
14 because I'm convinced that you can not afford to pay one, but  
15 you must pay the special assessment of \$100.

16 I believe that the this sentence is sufficient but not  
17 greater than necessary to comply with the purposes of  
18 sentencing set forth in the sentencing statute of 3553(a).

19 I'm also going to impose supervised release. So feel  
20 free to sit if you would prefer to do so.

21 The standard conditions of supervised release shall  
22 apply, as well as the following mandatory conditions. The  
23 defendant shall not commit another federal, state or local  
24 crime, shall not illegally possess a controlled substance;  
25 shall not possess a firearm or destructive device. The

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Sentence

1 mandatory drug testing condition is suspended based on the  
2 Court's determination that the defendant poses a low risk of  
3 future substance abuse. And the defendant shall cooperate in  
4 the collection of DNA as directed by the probation officer.

5 There are also certain standard, special conditions in  
6 addition to the standard conditions of supervised release. The  
7 defendant shall obey the immigration laws and comply with the  
8 directives of the immigration authorities in light of the  
9 nature of this crime. He is to report to the nearest probation  
10 office within 72 hours of release from custody and be  
11 supervised in the district of his residence. So that is the  
12 sentence.

13 Let's talk about forfeiture. I've read the  
14 Government's August 7th letter, motion for entry of a  
15 preliminary order of forfeiture against Mr. Xia, as well as the  
16 general motion concerning forfeiture filed back in June. Mr.  
17 Dratel, you didn't object. Do you have any objection to the  
18 forfeiture order?

19 MR. DRATEL: No, your Honor. But, you know, I just  
20 think again, you know, the amounts are there, and I understand  
21 what's law is. So I understand it's different in the context  
22 of forfeiture aspect of it but just, you know, should be  
23 tailored -- I mean there is an Eighth Amendment element to  
24 forfeiture as well, so.

25 THE COURT: I'm aware of that. I think the question

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Sentence

1 is is this something you want to brief and you want to be heard  
2 on?

3 MR. DRATEL: No, your Honor.

4 THE COURT: You do not have an objection to it?

5 MR. DRATEL: No, your Honor.

6 THE COURT: All right. Then I will sign off on the  
7 proposed order with respect to Mr. Xia. Just give me one  
8 second, please.

9 MS. MERMELSTEIN: Do you need a copy, your Honor?

10 THE COURT: Yes, I would love an extra copy. I know  
11 it's here somewhere.

12 (Hanging)

13 THE COURT: Thank you.

14 All right, so I'm looking loot at Exhibit A of the  
15 August 7th letter. And in light of the fact there is a no  
16 objection, I will sign this proposed preliminary order of  
17 forfeiture money judgment, which makes clear on page seven that  
18 as a result of offense charged in count one of the indictment  
19 and in count one of the superseding indictment, money judgment  
20 in the amount of \$16,100,000 in United States currency shall be  
21 ordered against the defendant. And I'm not going to read the  
22 rest of it because I understand, Mr. Dratel, you already  
23 reviewed this, but I will sign off and that will be part of the  
24 sentence.

25 Does either counsel know of any legal reason why the

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Sentence

1 sentence can not be imposed as stated?

2 MS. MERMELSTEIN: No, your Honor.

3 MR. DRATEL: No, your Honor.

4 THE COURT: All right, the sentence as stated is  
5 imposed.

6 Why don't we talk about surrender date. Approximately  
7 60 days from now, November 24th --does October 10th work as a  
8 sentencing date -- surrender date, excuse me.

9 MR. DRATEL: I think so, your Honor. Obviously that  
10 should be sufficient for designation. But in case not, we'll  
11 come back to the Court because there are advantages obviously  
12 for self surrender rather than surrendering to the Marshals at  
13 MCC in terms of credits and other things. So that if he's not  
14 designated by then, I may come back to the Court.

15 THE COURT: All right. If I don't hear from you, I  
16 expect you him Mr. Xia either to surrender to the institution  
17 that he's designated to before 2:00 p.m. on that date, which is  
18 October 10th or to the Marshals by 2:00 p.m. by that date. But  
19 if you have a particular application in the event that he's not  
20 designated by that time, I'm happy to consider that.

21 MR. DRATEL: Thank you, your Honor.

22 THE COURT: Mr. Xia's conditions of release shall  
23 continue up until the time that he reports to begin his  
24 sentence. If he fails to report for his sentence, he may be  
25 charged with another criminal offense.

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Sentence

1 That is the sentence of this Court.

2 Mr. Xia, you have a right to appeal your conviction  
3 and your sentence, except to whatever extent you may have  
4 waived that right as part of your plea agreement. The notice  
5 of appeal must be filed within 14 days of the judgment of  
6 conviction. If you are not able to pay the cost of an appeal,  
7 you may apply for leave to appeal in forma pauperis. If you  
8 request, the Clerk of Court will prepare and file a notice of  
9 appeal on your behalf.

10 Are there any other applications?

11 MR. DRATEL: Yes, your Honor, for designation to an  
12 institution as close as possible to New York City.

13 THE COURT: Yes, I will make that recommendation.  
14 I'll make that recommendation.

15 Anything from the government?

16 MS. MERMELSTEIN: No, your Honor.

17 THE COURT: Mr. Xia, I recognize this is a hard day  
18 for you, a hard day for your family members. And I just, I  
19 want to tell you I read all of those letters as I said earlier.  
20 You have so many people in your life who love you and respect  
21 you, and this activity need not define you. I'm hopeful that  
22 after you serve your sentence, you will go on to lead a  
23 productive and law abiding life, and I wish you luck with that.  
24 Thank you.

25 MR. DRATEL: Thank you, your Honor.  
(Adjourned)